STATE ETHICS COMMISSION

JOHN E. O'DONNELL
EXECUTIVE DIRECTOR

NANCY L. SPECK
GENERAL COUNSEL

FREDERIC M. BRANDES
STAFF COUNSEL

20072926

COMMISSION MEMBERS

HERBERT J. BELGRAD
CHAIRMAN
WILLIAM B. CALVERT
JERVIS S. FINNEY
REVEREND JOHN WESLEY HOLLAND
BARBARA M. STECKEL

ROOM 1515, 301 WEST PRESTON STREET
BALTIMORE, MARYLAND 21201
301-383-7813

March 13, 1980

Files

Governor Harry Hughes
State House
Annapolis, Maryland 21404

Dear Governor Hughes:

Enclosed is a copy of the First Annual Report of the State Ethics Commission which has been submitted to the General Assembly in accord with Section 2-103(f) of the Public Ethics Law.

The report covers the first six months of the Commission's existence and also briefly outlines plans for 1980.

I would like to thank you and your staff for the assistance provided in establishing this new agency. If you need any further information regarding the Commission or its work program, we are available at your convenience.

Sincerely,

John E. O'Donnell
Executive Director

JEO'D:pb

Enclosure

cc: Louise Keelty
Irvin E. Feinstein
Judson P. Garrett

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STATE ETHICS COMMISSION
1st Annual Report
July 1, 1979 to December 31, 1980

Appointment of the Commission

The members of the State Ethics Commission were appointed by the Governor in July of 1979 in conformance with the requirements of the statute. The appointed members of the Commission are:

Herbert J. Belgrad
William B. Calvert
Jervis S. Finney
Reverend John Wesley Holland
Barbara M. Steckel

The Commission members elected Mr. Belgrad as Chairman on July 24, 1979 as provided under the provisions of the Public Ethics Act.

Budget and Selection of Staff

The Commission was fortunate to be able to secure the services of Ms. Elizabeth L. Nilson as Acting Counsel to assist until the permanent staff was selected. Ms. Nilson had previously served as counsel to the predecessor Board of Ethics. The Commission received budget support from appropriations of the predecessor Board of Ethics. Additional funds were provided from the General Emergency Fund. The Board of Public Works approved the budget and the following five staff positions:

1. Executive Director
2. General Counsel
3. Staff Counsel
4. Administrative Assistant
5. Secretary

The positions of Executive Director, General Counsel and Staff Counsel are required by law.

All positions were advertised with the assistance of the Secretary of Personnel. A very large number of resumes were received and reviewed. In October, the Commission selected its Executive Director. The Executive Director is charged with the administration of the office and staff. The General Counsel was selected in November. The Staff Counsel and the remainder of the staff was selected in December.

The Commission's F.Y. 1981 budget was submitted to the Governor in early December.

Meetings

The Commission maintained a very active schedule of meetings in order to organize its program while performing the ongoing duties required by the law. The Commission meeting schedule was as follows:

July 13, 1979
July 24, 1979
August 29, 1979
September 26, 1979
October 13, 1979
October 17, 1979
November 21, 1979
November 28, 1979
December 17, 1979

STATUTORY IMPLEMENTATION

Advisory Opinions and Conflict of Interest

During the first six months of its existence, the Commission received 26 requests for advisory opinions. As of December 31st, the Commission has given formal consideration or responses to 14 of these requests. Requests for opinions covered employees, officials, and non-compensated board members. Almost all requests related to Title 3 of the law covering conflict of interests. These requests have required close consideration of a variety of statutory provisions, including financial interest, employment restrictions, and use of prestige of office.

Lobbying Disclosure

Lobbyist Disclosure files for 1978 and 1979 were transferred to the Commission by the Secretary of State prior to hiring its staff. The Commission secured the part-time services of Professor Everett Goldberg of the University of Maryland to draft new Lobbyist Disclosure forms to conform with the new statute. Professor Goldberg had been the Executive Secretary for the Financial Disclosure Advisory Board. In November, the Commission sent lobbyist reporting forms to all those required to report for the period beginning May 1, 1979 to October 31, 1979. These reports were due by November 30, 1979. New registration and authorization forms were also sent to those lobbyists registered at that time.

After consultation with the Legislative leadership, it was decided to maintain a temporary office in Annapolis during the legislative session to maintain lobbyist files for public inspection and to assist in registration. It was also anticipated that this office would help facilitate the filing of financial disclosure reports. Office space was provided to the Commission in the Thomas Hunter Lowe, House of Delegates Building.

Financial Disclosure

The Commission used the services of Professor Everett Goldberg to revise the financial disclosure forms to conform to the new law. The new law greatly expands the number of persons required to file financial disclosure reports. The Commission staff is in the process of developing a system for identifying, notifying those required to report. Additionally, there is a need to assist those required to report and to review those reports. Under the previous law, less than about 1,000 employees and officials were required to file financial disclosure reports. The new law will cover at least 6,000 employees and officials.

Local Government

Title 6 of the Public Ethics Law establishes a program requiring local government (counties and municipalities) to establish ethics laws covering conflict of interest, financial disclosure, and lobbying by December 31, 1980. At its December meeting, the Commission established a general approach for implementing its statutory responsibilities for developing model provisions for localities and considering extentions or exemptions. The Commission and its staff will work closely with local government in this process. The Commission staff will provide technical assistance, mutual exchange of information and training.

Law Development

The Commission activities have included a close review of the new Public Ethics Law. Through its advisory opinion process, it has begun to apply the law to create situations, thus providing guidance to employees and State officials. In three instances, the Commission has asked the Attorney General for opinions regarding various provisions of the Public Ethics Act.

The first request was in regard to the power of the State Ethics Commission to act on reports and complaints filed before July 1, 1979, the effective date of the Public Ethics Law. The Attorney General concluded that the State Ethics Commission may review and act on reports and complaints even though filed before July 1, 1979, but only to the extent the former Public Disclosure Advisory Board and Board of Ethics could have acted.

The second request asked for advice in reconciling the confidentiality requirements of the Ethics Law for advisory opinions and the open meeting law. As a result of this opinion, the Commission adopted a policy that if the subject of the opinion waived confidentiality, any hearings and deliberations would be open to the public. If the subject did not waive confidentiality, then any hearing would be closed, but the deliberations would be open if they could be carried out without revealing the identity of the subject.

The third request asked advice regarding the use of the meaning of the terms "financial interest" and "interest" as used in the statute. There was a concern that the General Assembly may have inadvertently used the term "interest" instead of "financial interest" in some sections. The Attorney General advised that the word "interest" must be construed and applied as it is used and defined in the law. (Copies of the Attorney General's opinions are attached to this report.)

FUTURE PLANS AND ISSUES

In 1980 the Commission will have the benfit of its first full year with the staff and Commission members being in operation. The following areas will represent major work program activities during 1980.

Law Development

The new Public Ethics Law gives the state its first opportunity to have fully unified policy and administration of the Public Ethics laws. A result of this coordinated effort is the development of greater awareness of problems in the wording and structure of various provisions of the law. Some of these problems are the result of new provisions in the law. A major Commission activity will be to clarify the application of the law either through opinion, complaint or regulation. The Commission will also suggest law change where appropriate.

Financial Disclosure and Conflict of Interest

A system for identification of those persons required to file financial disclosure will be implemented. Since there is a major increase in those required to file, new notification and filing systems are also needed. Computerization is likely. Systems and procedures will be developed for investigation of complaints.

Lobbyist Disclosure

The lobbyist disclosure forms will need revisions in 1980 in order to make them easier to understand, complete and review. The Commission staff also intends to prepare materials and hold briefing sessions to help people comply with the law.

A system of monitoring to make sure people are registering as required will be developed.

Public Information and Education

A major thrust during 1980 will be the development, distribution and presentation of materials covering the Public Ethics law to people throughout the state. This information will be made available to people covered by the act and the general public.

Local Government Implementation

The Maryland Public Ethics Act requires each city and county to implement ethics laws covering conflict of interest, lobbyist disclosure and financial disclosure no later than December 31, 1980. The law gives the Ethics Commission significant responsibilities in preparing model codes

and authorizing modifications, exemptions or time period extensions in the law.

The Commission is working closely with local government in implementing the law. A program of public information, technical assistance, and training will be implemented.

STEPHEN H. SACHS
ATTORNEY GENERAL

GEORGE A. NILSON
DEPUTY ATTORNEY GENERAL
383-3724

ELEANOR M. CAREY
ASSOCIATE DEPUTY ATTORNEY GENERAL
383-3727

MICHAEL A. MILLEMANN
CHIEF GENERAL COUNSEL AND
CHIEF, CIVIL DIVISION
383-3742

AVERY AISENSTARK
PRINCIPAL COUNSEL
OPINIONS AND ADVICE
383-3747

DAVID H. FELDMAN
CHIEF OF LITIGATION
383-3788

JAMES G. KLAIR
COUNSEL FOR ADMINISTRATION
383-3790

OFFICES OF

THE ATTORNEY GENERAL

ONE SOUTH CALVERT BUILDING

BALTIMORE, MARYLAND 21202

301-383-3737

DEBORAH K. HANDEL, CHIEF
CRIMINAL APPEALS AND CORRECTIONAL
LITIGATION DIVISION
383-3785

DEBORAH E. JENNINGS, CHIEF
CRIMINAL INVESTIGATIONS DIVISION
383-3733

CHARLES O. MONK II, CHIEF
ANTITRUST DIVISION
383-2092

OTHER OFFICES:

H. ROBERT ERWIN, JR., CHIEF
CONSUMER PROTECTION DIVISION
131 E. REDWOOD STREET
BALTIMORE, MARYLAND 21202
383-5344

ANDREW C. TARTAGLINO, CHIEF
MEDICAID FRAUD CONTROL UNIT
15 CHARLES PLAZA
SUITE 301 - ST
BALTIMORE, MARYLAND 21201
383-7900

ROBERT A. ZARNOCH, COUNSEL
GENERAL ASSEMBLY
104 LEGISLATIVE SERVICES BUILDING
ANNAPOLIS, MARYLAND 21401
269-3786

October 2, 1979

Mr. Herbert J. Belgrad
Chairman
State Ethics Commission
Sun Life Building
20 South Charles Street
Baltimore, Maryland 21201

Dear Chairman Belgrad:

You have requested our opinion on the power of the State Ethics Commission to act on financial disclosure and lobbying activity reports and conflict of interest complaints filed before July 1, 1979, the effective date of the Public Ethics Law (Article 40A of the Maryland Code).

For the reasons stated below, we conclude that the State Ethics Commission may review and act on the above reports and complaints, even though filed before July 1, 1979, but only to the extent the former Public Disclosure Advisory Board and Board of Ethics could have acted.

At the 1979 legislative session, the General Assembly enacted a comprehensive public ethics law, Chapter 513, Laws of Maryland 1979. This legislation, although continuing many features of existing law, enacted a new Article 40A of the Maryland Code and established new requirements governing conflicts of interest of public officers and employees, financial disclosure by certain persons, and the reporting of lobbying activity. In addition, Article 40A set up a new State Ethics Commission with a broad range of enforcement powers. At the same time, the Public Disclosure Advisory Board - which had exercised certain duties with respect to financial and lobbying disclosure (former Article 33,

§29-7 of the Maryland Code) - was abolished effective July 1, 1979. Also, specific statutory authority for the adoption of a Code of Ethics for Executive Branch Officers and Employees (former Article 41, §14A of the Maryland Code) was repealed.[1]

You have indicated that, before it went out of existence, the Public Disclosure Advisory Board did not have the opportunity to complete the review of financial disclosure statements filed on April 15, 1979, and could not process lobbying activity reports due on May 30, 1979. Indeed, some of the latter reports are overdue and still outstanding. In addition, by June 30, 1979, the Board of Ethics had not acted on several pending complaints dealing with conflicts of interest. Despite the fact that neither Article 40A nor Chapter 513 contain any transitional provisions, it is our opinion that other provisions of State law preserve the new State Ethics Commission's ability to handle and investigate those reports and complaints to the extent the former agencies could have acted.

Article 41, §7 of the Maryland Code provides that:

> "All petitions, hearings and other proceedings pending before any officer, board, commission, department or other governmental agency which is abolished or superseded by any act of the legislature, and all prosecutions, legal or other proceedings and investigations begun by or before any such agency so abolished or superseded, and not completed at the time of the taking effect of such act, shall continue and remain in full force and effect notwithstanding the passage of such act, and may be completed before or by the department which succeeds to the rights, powers, duties, obligations and functions of the agency so abolished or superseded, or before or by the successor of the agency so abolished or superseded, to the same extent that such agency itself could have done had the same not been abolished or superseded, and all penalties, fines or forfeitures incurred or accrued before such act takes effect or at the time thereof, and which would be subject to enforcement by an officer, board, commission, department or other agency abolished or superseded hereby, shall be enforced by the department to which the rights,

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1 Both the Code of Ethics and the Board of Ethics set up to administer it were established by Executive Order. Executive Order 01.01.1969.07, dated September 4, 1969, as last amended by Executive Order 01.01.1978.09, dated June 29, 1978. This Executive Order has not been rescinded.

> powers, duties, obligations, and functions of such agency so abolished or superseded are transferred, or by the successor to the agency so abolished or superseded."

Section 7 is one of a series of provisions in Article 41 designed to insure continuity between superseded State agencies and their successors. See Article 41, §5 (transfer of records and equipment to successor agency); §8 (continuance of orders, rules and regulations); §10 (contracts and obligations remain in force).

In addition, Article 1, §3 of the Maryland Code provides that:

> "The repeal, or the repeal and reenactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal, shall not have the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, section or part thereof, [2] unless the repealing, repealing and reenacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and reenacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability."

This "savings clause" preserves potential civil or criminal liability for those who, before July 1, 1979, may have violated provisions of the repealed laws relating to conflicts of interest and financial and lobbying disclosure.

In our view, Article 41, §7 applies to the State Ethics Commission and those agencies that administered ethics and disclosure requirements before July 1, 1979. The Commission is clearly a "successor" to those agencies. Many existing requirements

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2 The prevailing view is that for purposes of a "savings clause" such as Article 1, §3, a "penalty, forfeiture or liability" is"incurred"at the time the violation of the act occurs. See State v. Matthews, 310 A.2d 17, 20 (Vt. 1973) and cases there cited.

and powers set forth in the old law were transferred to the new agency under Article 40A. In addition, in Article 40A itself the General Assembly suggested that the Ethics Commission is a successor agency. Section 2-104(d) of Article 40A provides:

> "Unless the appropriate advisory body otherwise decides, a person subject to the provisions of this article may rely upon a published opinion of the executive branch board of ethics, public disclosure advisory board, any comparable local body, or any other similar or predecessor body, unless that opinion is plainly inconsistent with the provisions of this article." (Emphasis added.)

Finally, the terms "proceedings" and "investigation" in §7 are broad enough to include financial disclosure and lobbying activity reports (review of which is called for by the statute) and ethics complaints (investigation of which is needed to determine if further proceedings are warranted).

However, although Article 41, §7 and Article 1, §3 preserve the Commission's ability to act on pre-July 1, 1979 disclosure and lobbying activity reports and conflict of interest complaints, §7 expressly limits the Commission's powers as a successor agency to those that its predecessor may have exercised. Thus, for example, if, on reviewing pre-July 1, 1979 financial disclosure reports, the Commission detects a violation of the law, it can do no more than refer the matter to the Attorney General for civil suit enforcement - as was the case with the former Public Disclosure Advisory Board. (See former Article 33, §29-8.) It could not exercise its present power to issue a cease and desist order or reprimand or petition for injunctive relief on its own. (See Article 40A, §2-105 and §7-101.) Therefore, in handling pre-July 1, 1979 reports and complaints, and in investigating related violations, the Commission should be guided by those provisions that governed the powers and duties of the former Public Disclosure Advisory Board and the Board of Ethics.

Very truly yours,

Stephen H. Sachs
Attorney General

Robert A. Zarnoch
Assistant Attorney General

Avery Aisenstark
Principal Counsel
Opinions and Advice

SHS/RAZ:imb

STEPHEN H. SACHS
ATTORNEY GENERAL

GEORGE A. NILSON
DEPUTY ATTORNEY GENERAL
383-3724

ELEANOR M. CAREY
ASSOCIATE DEPUTY ATTORNEY GENERAL
383-3727

MICHAEL A. MILLEMANN
CHIEF GENERAL COUNSEL AND
CHIEF, CIVIL DIVISION
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AVERY AISENSTARK
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MEDICAID FRAUD CONTROL UNIT
15 CHARLES PLAZA
SUITE 301 - ST
BALTIMORE, MARYLAND 21201
383-7900

ROBERT A. ZARNOCH, COUNSEL
GENERAL ASSEMBLY
104 LEGISLATIVE SERVICES BUILDING
ANNAPOLIS, MARYLAND 21401
269-3786

November 13, 1979

Mr. Herbert J. Belgrad
Chairman
State Ethics Commission
Sun Life Building
20 South Charles Street
Baltimore, Maryland 21201

Dear Chairman Belgrad:

You have requested our opinion on the applicability of the Governor's Executive Order on Open Meetings to those proceedings of the State Ethics Commission that involve the issuance of advisory opinions.

Article 40A, §2-104 of the Maryland Code provides for the State Ethics Commission to issue advisory opinions on the application of the financial disclosure, lobbying reporting, and conflict of interest provisions of Article 40A, the new Public Ethics Law. Under §2-104(a), advisory opinions are required to be issued at the request of those who are subject to the Public Ethics Law; they also may be issued at the request of any other person, as deemed "appropriate" by the Commission. In both cases, according to §2-104(c):

> "Advisory opinions shall be in writing and be published in the Maryland Register. Before an advisory opinion is made public, any material which may identify the person who is the subject of the opinion, shall, to the fullest extent possible, be deleted, and the identity of the person shall not be revealed."

The Governor's Executive Order on Open Meetings[1] generally mandates that executive public bodies conduct their meetings in public; however, among several exemptions from this general mandate,[2] it exempts meetings that are closed in compliance with "a specific ... statutory ... requirement protecting particular proceedings or matters from public disclosure". Executive Order No. 01.01.1976.09, para. 2(a) and (b)(13). You have asked whether Article 40A, §2-104(c) effectively requires that Commission advisory opinion proceedings be held in executive session and, thus, is a "statutory ... requirement" of the type referred to in the Executive Order. In this regard, you have advised us that:

> "The advisory opinion request process before the Commission consists of two phases. During the first, or fact-finding phase, either the Commission's Counsel or the individual requesting the opinion, explains the details of the matter to be decided. The second phase consists of the Commission's discussion and deliberations leading to a decision on the issue."

For the reasons given below, it is our opinion that Article 40A, §2-104(c) does not provide an automatic or general exemption from the requirements of the Governor's Executive Order on Open Meetings. Under certain circumstances, §2-104(c) might require some advisory opinion proceedings to be closed to the public; but, given the dictates of the Executive Order, these proceedings may be closed only to the extent that they would, in the good faith exercise of the Commission's best judgment, necessarily lead to an identification of the person who is the subject of the proposed opinion. If the proceedings can be publicly conducted in some way that will protect the confidentiality of the subject of the opinion, or if the subject of the opinion voluntarily waives the confidentiality afforded by §2-104(c), the proceedings cannot be closed on the basis of §2-104(c).

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1 The Executive Order on Open Meetings is reprinted on pages 205-08 of the 1979 Cumulative Supplement to Volume 9A of the Annotated Code of Maryland.

2 Obviously, under the proper circumstances, the Commission may rely on those other exemptions to hold advisory opinion proceedings in executive session. See, e.g., Executive Order No. 01.01.1976.09, para. 2(b)(6) (consultation with legal counsel); (7) (consultation with staff regarding pending or potential litigation); and (14) (closing of meetings by 2/3 vote for exceptional reasons). In this opinion, however, we address only paragraph 2(b)(13) of the Executive Order, as it relates to §2-104(c) of Article 40A; for this purpose, we need not consider whether or to what extent the other exemptions might apply to advisory opinion proceedings.

Under the terms of the Governor's Executive Order on Open Meetings, there is little doubt that the State Ethics Commission is an "executive public body" and that the issuance of an advisory opinion in accordance with the Public Ethics Law is an "executive function". Executive Order No. 01.01.1976.09, para. 1(c) and (d).[3] Thus, in exercising its advisory opinion function, the Commission is subject to the Executive Order and, except as permitted by that Order, must open its proceedings to the public.

Undoubtedly, Commission compliance with Article 40A, §2-104(c) may require the closing to the public of all or a portion of certain advisory opinion proceedings. Section 2-104(c) prevents the Commission, on publication of an advisory opinion, from revealing "the identity" of the person who is the subject of that opinion. Obviously, there will be occasions where the identity of such a person will necessarily be revealed during Commission proceedings - whether by the subject's appearance before the Commission or the presentation or discussion of identifying facts and circumstances relating to the opinion request. In our unpublished opinion of June 7, 1978, to Everett F. Goldberg, Esquire, Executive Secretary of the former Public Disclosure Advisory Board, we stated:

> "Section 29-7(b)(4) of Article 33[4] prevents the [Public Disclosure Advisory] Board upon publication of opinions from identifying the persons subject to the Acts who request an opinion unless they have consented to such identification. Obviously, this prohibition to be effective must also cover Board discussions of such advisory opinions at its meetings but only where this

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3 In an unpublished opinion, dated June 7, 1978, to Everett F. Goldberg, Esquire, Executive Secretary of the former Public Disclosure Advisory Board, we advised that the issuance of advisory opinions by that Board (which was the predecessor agency to the Commission in the administration of State financial disclosure requirements) was an "executive" function subject to the Open Meetings Executive Order and not an advisory function subject to Article 76A, the statutory Open Meetings Law. Unpublished Opinion No. 78-079 (June 7, 1978). For reasons stated in that opinion, it is clear that the advisory opinion function of the new State Ethics Commission is likewise subject only to the Open Meetings Executive Order and not Article 76A.

4 Former Article 33, §29-7(b)(4), as amended by Chapter 938, Laws of Maryland 1977, is in essence the predecessor statute to present Article 40A, §2-104. Not unlike §2-104, it provided for the issuance of advisory opinions by the former Public Disclosure Advisory Board to certain persons, with the caveat that "the Board, in publishing those opinions, may not identify the person requesting the opinion, without the consent of [that] person".

discussion would necessarily lead to an identification of the individual in question." Unpublished Opinion No. 78-079 (June 7, 1978) (Emphasis in original).[5]

Thus, §2-104(c) may and should be used to close advisory opinion proceedings when such proceedings would "necessarily" lead to an identification of the subject of the opinion request. This does not mean, however, that §2-104(c) automatically may be used to justify an executive session every time an opinion request is presented and considered.

It is obvious that §2-104(c) does not confer a comprehensive privilege against disclosure, but only a partial one. This is evident, for example, by comparing its provisions with those of §2-105(e), which governs complaints of alleged violations of the Public Ethics Law: §2-105(e), in far broader terms than those found in §2-104(c), mandates confidentiality of all "proceedings, meetings, and activities of the Commission and its employees in connection with" a complaint. Similarly, §2-104(c) itself represents

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5 The conclusion reached in that opinion - that protection against disclosure of facts may sometimes be necessary to prevent disclosure of identity - is echoed in analogous areas of the law. Cf., e.g., Nappier v. Jefferson Standard Life Insurance Co., 322 F. 2d 502, 504 (4th Cir. 1963) (The aims of a statute prohibiting publication of the name of a rape victim "could not be fully achieved if only disclosure of one's proper name was forbidden. Publication of a description of the woman by identifying her through circumstances would in effect name her. After all, a name is but a designation, and a description is frequently a more positive identification than a name. ... We recognize faces, or know persons by reputation, when we do not know them by name. ... An episode can be more revealing than a family name, a sobriquet than a surname."); State v. Evjue, 33 N.W. 2d 305, 310 (Wis. 1948) ("It is also clear that [a statute prohibiting publication of the identity of a rape victim] prohibits the publication of information which of itself or by reference furnishes the means of identification."); Roviaro v. United States, 353 U.S. 53, 60 (1957) ("The scope of the privilege [against disclosure of an informer's identify] is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged.").

Article 40A, §2-104(c) itself makes explicit that which we find to be implicit in former Article 33, §29-7(b)(4): unlike former §29-7(b)(4) [see note 4 above], §2-104(c) expressly requires the deletion, "to the fullest extent possible", of "any material which may identify the person who is the subject of the opinion". This reference to "any material" echoes the provisions of the Executive Order which, as noted above, exempts from the open meetings requirement meetings closed in compliance with a statutory requirement "protecting particular ... matters" from disclosure.

a substantial narrowing of the confidentiality previously accorded advisory opinion proceedings: former Article 33, §29-7(b)(4), as originally enacted by Chapter 3, Laws of Maryland 1973, 1st Special Session, provided that, in responding to a request for an advisory opinion from a person subject to the financial disclosure law, "no such request, investigation made pursuant thereto, or opinion shall be made public without the consent of the person requesting the opinion"; as later amended by Chapter 938, Laws of Maryland 1977, §29-7(b)(4) - the immediate predecessor to §2-104(c) - eliminated this broad confidentiality requirement and provided merely that, in publishing these opinions, the former Public Disclosure Advisory Board "may not identify the person requesting the opinion, without the consent of [that] person". Finally, although §2-104(c) requires the Commission to delete from the opinion - i.e., to maintain confidential - "any material which may identify" the subject, this requirement applies only "to the fullest extent possible"; again, the confidentiality requirement obviously was not intended by the General Assembly to be absolute and without qualification. It is this narrowed scope of confidentiality that must be considered in conjunction with the Executive Order's exemption for meetings held in compliance with a "specific" statutory requirement of confidentiality.

Consequently, even while complying with §2-104(c) the Commission must also make every reasonable effort to comply with the provisions of the Open Meetings Executive Order. In this regard, we agree with the analysis that "[t]he requirements of the Executive Order are not limited to the actual making of decisions, or taking of final actions, but extend to the whole deliberative process leading up to final action". Memorandum of November 1, 1976, from then Attorney General Francis B. Burch and then Chief Legislative Officer for the Governor, Alan M. Wilner, to all Executive Branch agencies.

When a conflict develops between the two mandates, as it often might, the Commission in good faith must attempt to accommodate both competing interests. For example, the subjects of proposed advisory opinions may be advised that they can waive the privilege afforded them by §2-104(c); if the privilege is waived by the subject of an advisory opinion, subsequent proceedings - whether during the fact-finding phase or the deliberative phase - may not be closed in reliance on §2-104(c). Conversely, a personal appearance during the fact-finding phase by the subject of an opinion request who has not waived his or her privilege of confidentiality should invariably take place at a closed session to protect the identity of the individual from disclosure. However, subsequent deliberations by the Commission (at which there would usually be no need for the subject's formal presence) could - and, therefore, should - remain open as long as the matter can be reasonably discussed without disclosing the identity of the subject.

In most cases, it should be relatively easy to mask the identity of the subject by the use of various conventional devices (e.g., "Mr. X"; "Transaction A"). We recognize that such "verbal censorship" might be somewhat awkward and inconvenient; admittedly, holding deliberations in public - coupled with a requirement to protect the identity of the subject of those deliberations - will on occasion tend to inhibit completely free-flowing discussion. Nevertheless, we do not believe that the Commission may avoid the mandate of the Executive Order simply because compliance with that mandate will or may make the deliberative process awkward or more difficult. As long as this "verbal censorship" does not prevent the Commission from reaching a reasoned conclusion in its deliberations, the provisions of §2-104(c) do not, in our view, permit closed, executive sessions. Rather, the Commission is bound to use whichever alternative device does least "damage" to the mandate of conducting open meetings, yet protects the identity of the subject of the opinion requested. We recognize that, on some occasions, the Commission may find that the only way to protect a subject's identity is to deliberate in private; if, in good faith exercise of its discretion, the Commission determines that, in a specific case, the only reasonable alternative is to conduct a closed meeting, it may do so. On many occasions, however, we believe that the Commission will be able to adequately conduct its advisory opinion proceedings in public sessions, even while maintaining the confidentiality imposed on it by §2-104(c).

In summary, it is our opinion that Article 40A, §2-104(c) does not provide an automatic or general exemption from the requirements of the Governor's Executive Order on Open Meetings. Under certain circumstances, §2-104(c) might require some advisory opinion proceedings to be closed to the public; but, given the dictates of the Executive Order, these proceedings may be closed only to the extent that they would, in the good faith exercise of the Commission's best judgment, necessarily lead to an identification of the person who is the subject of the proposed opinion. If the proceedings can be publicly conducted in some way that will protect the confidentiality of the subject of the opinion, or if the subject of the opinion voluntarily waives the confidentiality afforded by §2-104(c), the proceedings cannot be closed on the basis of §2-104(c).

Very truly yours,

Stephen H. Sachs
Attorney General

Robert A. Zarnoch
Assistant Attorney General

Avery Aisenstark
Principal Counsel
Opinions and Advice

STEPHEN H. SACHS
ATTORNEY GENERAL

GEORGE A. NILSON
DEPUTY ATTORNEY GENERAL
383-3724

ELEANOR M. CAREY
ASSOCIATE DEPUTY ATTORNEY GENERAL
383-3727

MICHAEL A. MILLEMANN
CHIEF GENERAL COUNSEL AND
CHIEF, CIVIL DIVISION
383-3742

AVERY AISENSTARK
PRINCIPAL COUNSEL
OPINIONS AND ADVICE
383-3747

DAVID H. FELDMAN
CHIEF OF LITIGATION
383-3788

JAMES G. KLAIR
COUNSEL FOR ADMINISTRATION
383-3790

OFFICES OF

THE ATTORNEY GENERAL

ONE SOUTH CALVERT BUILDING

BALTIMORE, MARYLAND 21202

301-383-3737

DEBORAH K. HANDEL, CHIEF
CRIMINAL APPEALS AND CORRECTIONAL
LITIGATION DIVISION
383-3785

DEBORAH E. JENNINGS, CHIEF
CRIMINAL INVESTIGATIONS DIVISION
383-3733

CHARLES O. MONK II, CHIEF
ANTITRUST DIVISION
383-2092

OTHER OFFICES:

H. ROBERT ERWIN, JR., CHIEF
CONSUMER PROTECTION DIVISION
131 E. REDWOOD STREET
BALTIMORE, MARYLAND 21202
383-5344

ANDREW C. TARTAGLINO, CHIEF
MEDICAID FRAUD CONTROL UNIT
15 CHARLES PLAZA
SUITE 301 - ST
BALTIMORE, MARYLAND 21201
383-7900

ROBERT A. ZARNOCH, COUNSEL
GENERAL ASSEMBLY
104 LEGISLATIVE SERVICES BUILDING
ANNAPOLIS, MARYLAND 21401
269-3786

January 3, 1980

Mr. Herbert J. Belgrad
Chairman
State Ethics Commission
301 West Preston Street
Baltimore, Maryland 21201

Dear Mr. Belgrad:

This is in response to your request for our opinion concerning the use of the terms "financial interest" and "interest" in §§3-101(a) and 3-103(a) of the recently enacted Maryland Public Ethics Law, Article 40A of the Maryland Code. You have suggested that the General Assembly may have inadvertently used the term "interest" instead of "financial interest" in some or all of these sections. However, in the absence of clear evidence that this is so, we think that terms must be construed and applied as they are used and defined in the law.

In your letter, you direct our attention particularly to the use of the term "interest", rather than "financial interest", in §§3-101(a), 3-101(a)(6), and 3-103(a), as follows:

Section 3-101:

> "(a) Except as permitted by regulation of the Commission as to officials and employees subject to its authority, the opinion of an advisory body, or other provisions of this title, an official or employee may not participate in any matter, except in the exercise of an administrative or ministerial duty which does not affect the disposition or decision with respect to that matter, if, to his knowledge, he, his spouse, parent, minor child, brother, or sister has an interest

> therein of if any of the following is a party thereto:
>
> ....
>
> (6) Any business entity which is a creditor or obligee of the official or employee, or which he knows is a creditor or obligee of any of the above named relatives, with respect to a thing of economic value and which, by reason thereof, is in a position to affect directly and substantially the interest of the official or employee or any of the above named relatives." (Emphasis added.)[1]

Section 3-103:

> "(a) An official or employee, except a member of the General Assembly, may not be employed by, or have an interest in, any entity subject to the authority of that official or employee or of the government agency with which he is affiliated or by any entity which is negotiating or has entered a contract with that government agency. This prohibition does not apply to a public official who is appointed to a regulatory or licensing authority pursuant to statutory requirement that persons subject to the jurisdiction of the authority be represented in appointments to it." (Emphasis added.)

In Article 40A, the term "interest" is broadly defined as "any legal or equitable economic interest";[2] "financial interest" is more narrowly defined as an economic interest above a

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1 In contrast to these two uses of the word "interest", the term "direct financial interest" is used in §3-101(a)(1) and (5).

2 Section 1-201(m) defines "interest" as follows:

> "(m) 'Interest' means any legal or equitable economic interest, whether or not subject to an encumbrance or a condition, which was owned or held, in whole or in part, jointly or severally, directly or indirectly, at any time during the calendar year for which a required statement is to be filed. 'Interest' does not include:

(continued)

certain threshold value.[3] Thus, the use of the term "interest", rather than "financial interest", significantly broadens the scope of the quoted prohibitions.[4] As we indicated in our bill review letter of May 17, 1979,[5] it is unclear whether the omission of the word "financial" before "interest" was inadvertent or intentional.

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2 (continued)

(1) An interest held in the capacity of a personal representative, agent, custodian, fiduciary, or trustee, unless the holder has an equitable interest therein;

(2) An interest in a time or demand deposit in a financial institution;

(3) An interest in an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed number of dollars either in a lump sum or periodically for life or some other specified period; or

(4) A common trust fund or a trust which forms part of a pension or profit sharing plan which has more than 25 participants and which has been determined by the Internal Revenue Service to be a qualified trust under §§401 and 501 of the Internal Revenue Code of 1954." (Emphasis added.)

The language in the definition that is emphasized above obviously only has meaning in the context of the provisions of Title 5 of the Public Ethics Law, requiring the filing of financial disclosure statements for succeeding calendar year periods. Since the conflicts provisions of Title 3 (with which we deal here) relate to interests held at the time an official or employee acts on a matter, and not to the calendar year covered by a financial disclosure statement, the emphasized language should be ignored in applying the defined term "interest" (as well as item (1) of the definition of "financial interest"; see note 3 below) for purposes of Title 3.

3 Section 1-201(1) defines "financial interest" as follows:

"(1) 'Financial interest' means:

(1) Ownership of any interest as the result of which the owner has received within the past 3 years, or is presently receiving, or in the future is entitled to receive, more than $1,000 per year, or

(2) Ownership, or the ownership of securities of any kind representing or convertible into ownership, of more than 3 percent of a business entity."

4 The broader term "interest", rather than the marrower term "financial interest", is also used in several places in §3-102, dealing with conflicts of members of the General Assembly.

5 Letter from Attorney General Stephen H. Sachs to Governor Harry Hughes regarding then Senate Bill 1120 (enacted as Chapter 513, Laws of Maryland 1979).

Section 3-101(a) is clearly modeled on Article III, §6 of the Executive Code of Ethics, which was first adopted in 1969 and last revised in 1978. As revised, the word "financial" was inadvertently deleted from before "interest" in the general prohibition on participating "in a transaction involving the State in which an officer or employee has a direct interest". 5 Maryland Register 1177, 1179 (July 28, 1978). Although the omission and its inadvertence were noted in the Code of Maryland Regulations, COMAR 01.01.1978.09, it was not noted in the publication of the revised Executive Code in the 1978 Supplement to Volume 9A of the Maryland Code.[6] Thus, as to §3-101(a), the omission may have simply, but inadvertently, been carried forward from the Executive Code. On the other hand, we cannot ignore the fact that the comparable provision of the ethics bill that passed the Senate in 1978 - and was surely familiar to the sponsors of the 1979 legislation - did use the term "financial interest". See Senate Bill 944, Third Reader, proposing new Article 19A, §13.

As to §3-103(a), the omission of the word "financial" is even less likely to have been inadvertent inasmuch as the term "financial interest" was used in the provision of the revised Executive Code of Ethics on which §3-103(a) was modeled. See Article III, §7.

In these circumstances, there is no clear and compelling evidence that the term "interest" was inadvertently used for "financial interest" in §§3-101(a), 3-101(a)(6), and 3-103(a) of the new Public Ethics Law. While it may in fact be the case that the use of the term was inadvertent in some or all of these provisions, neither we nor the courts are free to correct such legislative "mistakes"; the plain words of the statute must be followed unless absurd and clearly unintended consequences would follow. We cannot say that the consequences here would be absurd or clearly unintended.

Accordingly, we think that the term "interest" must be construed and applied as it is used and defined in this law. If this results in inconsistencies with other provisions of the law that use the term "financial interest" or in what might be considered unduly harsh consequences, we can only suggest that you bring this to the attention of the appropriate committees of the General Assembly for their consideration at the forthcoming session. In the meantime, the Commission does have it within its power to

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6 This omission continues in the publication of the revised Code in the 1979 Supplement, at page 189.

ameliorate the situation, at least with respect to §3-101, by the adoption of an appropriate regulation confining proscribed conflicts to those situations where a financial interest is present.7

Very truly yours,

STEPHEN H. SACHS
Attorney General

By Richard E. Israel
Richard E. Israel
Assistant Attorney General

Avery Aisenstark
Principal Counsel
Opinions and Advice

UNPUBLISHED OPINION OF THE ATTORNEY GENERAL

7 Section 3-101(a) begins by excepting from its reach situations that are "permitted by regulation of the Commission".